Ngieng Shiat Yen v Ten Jit Hing

HIGH COURT (MIRI) — CIVIL APPEAL NO 11–02 OF 1999
SULAIMAN DAUD JC
27 OCTOBER 2000

Family Law *— Domestic violence — Application for protection order — Whether protection order can be granted without pending police investigation or criminal proceeding — Domestic Violence Act 1994 ss 4, 5 & 6*

By an ex parte originating application dated 21 November 1998, the appellant applied for protection orders under ss 4, 5 and 6 of the Domestic Violence Act 1994 ('the Act') for the respondent be restrained from using domestic violence against or making personal contact with her. The respondent, upon service of the order to him, applied under O 2 rr 1 and 2 of the Subordinate Court Rules 1980 for the order be set aside. On 5 March 2000, the learned magistrate set aside the order on the ground that a protection order under ss 4, 5 or 6 of the Act can only be granted if and only where there is a pendency of investigations or proceedings involving a complaint of domestic violence. The appellant appealed.

Held, dismissing the appeal:

(1) Section 4 of the Act should be read together with s 12. Section 4 provides for the powers of the court to issue the interim protection order while s 12 provides for the circumstances when such order may be sought. By reading the two sections together, an interim protection order may only be issued by the court if there is a pending investigation by the police following an investigation of domestic violence (see pp 294I–295A).

(2) Similarly, the issuance of a protection order under s 5 of the Act should be read together with s 13. A protection order may only be issued under s 5 in the following circumstances, ie: (i) there must be a criminal proceeding against the person in respect of whom the protection is sought; (ii) the criminal proceedings must relate to a charge for an offence involving domestic violence; and (iii) the protection order is issued as condition for such person's release on bail or upon the compounding of the offence. Such a view is also consistent with the meaning given to 'court' in s 2 where proceedings involving allegations of domestic violence is referred to as criminal proceedings (see p 295C–D).

(3) It is not acceptable that the word 'proceedings' in s 5 is to be given a wider interpretation so as to include the proceedings for the protection order as taken out by the appellant in this action. To give such a construction would be contrary to the procedure and mechanism stipulated in the Act for the issuance of such protection order. The Act does not require a person seeking a protection order under s 5 to commence any separate

proceedings against the person in respect of whom the protection order is sought. Such protection order may be issued by the court in the course of the criminal proceedings against the accused if it is satisfied on the balance of probabilities that it is necessary for the protection and personal safety of the complainant (see p 295D–F).]

[**Bahasa Malaysia summary**

Melalui satu permohonan pemula ex parte bertarikh 21 November 1998, perayu telah memohon untuk perintah-perintah perlindungan di bawah ss 4, 5 dan 6 Akta Keganasan Rumahtangga 1994 ('Akta tersebut') agar responden dihalang daripada menggunakan keganasan rumahtangga terhadap atau menghubung secara peribadi dengan beliau. Responden, setelah serahan perintah tersebut dibuat ke atas beliau, memohon di bawah A 2 kk 1 dan 2 Kaedah-Kaedah Mahkamah Rendah 1980 agar perintah tersebut diketepikan. Pada 5 Mac 2000, majistret yang arif mengetepikan perintah tersebut atas alasan bahawa satu perintah perlindungan di bawah ss 4, 5 atau 6 Akta tersebut hanya boleh dibenarkan jika dan hanya di mana terdapat satu tangguhan siasatan atau prosiding melibatkan pengaduan mengenai keganasan rumahtangga. Perayu telah membuat rayuan.

Diputuskan, menolak rayuan tersebut:

(1) Seksyen 4 Akta tersebut hendaklah dibaca bersama dengan s 12. Seksyen 4 memperuntukkan kuasa mahkamah untuk mengeluarkan perintah perlindungan interim sementara s 12 memperuntukkan keadaan-keadaan di mana perintah sedemikian boleh dipohon. Dengan membaca kedua-dua seksyen tersebut bersama, satu perintah perlindungan interim hanya boleh dikeluarkan oleh mahkamah jika terdapat tangguhan siasatan oleh polis berikutan satu siasatan keganasan rumahtangga (lihat ms 294I–295A).

(2) Begitu juga, pengluaran satu perintah perlindungan di bawah s 5 Akta tersebut hendaklah dibaca bersama dengan s 13. Satu perintah perlindungan hanya boleh dikeluarkan di bawah s 5 di dalam keadaan-keadaan berikut, iaitu: (i) mesti terdapat satu prosiding jenayah terhadap seseorang di mana perlindungan tersebut dipohon; (ii) prosiding jenayah tersebut mesti mempunyai kaitan dengan satu tuduhan kerana kesalahan yang melibatkan keganasan rumahtangga; dan (iii) perintah perlindungan dikeluarkan sebagai satu syarat ke atas pembebasan dengan jaminan seseorang atau semasa mengkompaunkan kesalahan tersebut. Pendapat sedemikian juga selaras dengan maksud yang diberikan kepada 'mahkamah' dalam s 12 di mana prosiding yang melibatkan dakwaan keganasan rumahtangga adalah dirujuk sebagai prosiding jenayah (lihat ms 295C–D).

(3) Adalah tidak boleh diterima bahawa perkataan 'prosiding' dalam s 5 diberikan satu tafsiran yang lebih luas agar dapat meliputi prosiding untuk perintah perlindungan sebagaimana yang dilakukan oleh perayu di dalam tindakan ini. Dengan membenarkan tafsiran sedemikian akan bertentangan dengan prosedur dan mekanisma yang dinyatakan di dalam Akta tersebut untuk pengeluaran perintah perlindungan. Akta tersebut tidak menghendaki seseorang yang memohon satu perintah perlindungan di bawah s 5 memulakan apa-apa prosiding berasingan terhadap seseorang di mana perintah perlindungan tersebut dipohon. Perintah perlindungan sedemikian boleh dikeluarkan oleh mahkamah semasa prosiding jenayah terhadap tertuduh jika, atas imbangan kebarangkalian, ia adalah perlu untuk perlindungan dan keselamatan peribadi pengadu (lihat ms 295D–F).]

Cases referred to

Davis v Johnson [1978] 1 All ER 1132 (refd)
Harkness v Bell's Asbestos & Engineering Ltd [1967] 2 QB 729 (refd)

Legislation referred to

Domestic Violence Act 1994 ss 2, 4, 5, (1), 6, 12, 13, 14, 15, 20
Penal Code s 40
Subordinate Court Rules 1980 O 2 r 1 and 2

Bong Ah Loi (*Bong & Co*) for the appellant.
SH Lim (*SH Lim & Co*) for the respondent.

Sulaiman Daud J. C: This is an appeal against the decision of the learned magistrate in setting aside the ex parte order dated 7 October 1999, granted to the appellant pursuant to an ex parte originating application. By the ex parte order, the respondent is restrained from using domestic violence against the appellant.

Factual background

The factual background which led to this appeal can be stated quite shortly. By an ex parte originating application dated 21 November 1998 the appellant, being the applicant therein, applied for protection orders under ss 4, 5 and 6 of the Domestic Violence Act 1994 '(the Act'; and reference to a section herein shall be reference to a section of the Act) that the respondent be restrained from using domestic violence against or making personal contact with her and that she be granted the exclusive occupation of their shared residence at No 25 Jalan Rejang 20, Taman Tunku, Miri ('shared residence').

According to the appellant's affidavit, she was married to the respondent in 1986 and they have three children by the marriage, the eldest being eight years old and the youngest three months old. Approximately a

year after the marriage, the respondent started beating her up and on one occasion following an argument between them, the respondent locked her and their three children outside their shared residence. Things got out of hand when an attempt was made by the appellant to resolve their differences turned into a fight where she was kicked and beaten up by the respondent for which she sustained minor injuries which required medical treatment. The learned magistrate who heard the ex parte application made an order in terms of the prayer sought.

The respondent, upon service of the ex-parte order on him, applied under O 2 r 1 and 2 of the Subordinate Court Rules 1980 for an order that the said ex-parte order be set aside on the ground, among others, that the said order is a nullity and was made in contravention of the provisions of the Act. On 5 March 2000, the learned magistrate set aside the said ex-parte order on the ground that a protection order under ss 4, 5 or 6 can only be granted if and only where there is a pendency of investigations or proceedings involving a complaint of domestic violence. He also awarded costs to the respondent. Being dissatisfied with the said decision, the appellant appealed.

Issuance of protection order

I will firstly deal with the first ground of appeal which relates to the issuance of a protection order under the Domestic Violence Act 1994. It is obvious from the appellant's application that the protection order sought in this action is the order provided under s 5. In this regard, the learned counsel for the appellant submitted that ss 4, 5 and 6 cannot be read as though the said ss 5 and 6 can only be invoked after the condition set out in s 4 has been satisfied, that is there must be a pending investigation following an information relating to the commission of an offence involving domestic violence. According to the learned counsel, the said ss 4 and 5 should be read disjunctively and that the said sections provide for two different and separate remedies.

With regard to s 5, the learned counsel contended that reference to the expression 'proceedings involving complaints involving domestic violence' therein must not be construed as related to criminal prosecutions only, but also include proceedings for the issuance of the protection order as instituted by the appellant in this action. In support thereof, he referred to the view expressed by Lord Denning MR in the case of *Harkness v Bell's Asbestos & Engineering Ltd* [1967] 2 QB 729 that any application to court, however informal, is a proceeding. The learned counsel also referred to *Black's Law Dictionary* (7th Ed) where it is stated that the term 'proceedings' as applied to actions include the institution of the action.

The learned counsel for the respondent on the other hand submitted that to invoke the provisions of the Act, there must firstly be a report of an offence involving domestic violence to the enforcement officer and the interim protection order under s 4 may only be issued during the pendency of the investigation into such report. He further submitted that a protection order under s 5 may only be issued in criminal proceedings where the

person in respect of whom the investigation is carried out is charged for the offence.

Before embarking to deal with the related issues, it is convenient at this stage to refer to the relevant provisions of the Act to see if the questions raised by both counsels can be answered by the language of the Act itself. The object for which the Act was enacted, as provided in the long title thereto, is to make provisions for legal protection in situation of domestic violence and matters incidental thereto. In interpreting the provisions of the Act we must not lose sight of the provisions of s 3 thereof which expressly provide that the Act shall be read together with the provisions of the Penal Code. The other provisions of the Act, which in my view are directly related to the issuance of protection orders thereunder are ss 4, 5, 6, 12, 13, 14 and 15 thereof. Sections 4 and 5 which respectively provide for the powers of the court to issue interim protection orders, and protection orders read as follows:

> 4(1) The court may, during the pendency of investigations relating to the commission of an offence involving domestic violence, issue an interim protection order prohibiting the person against whom the order is made from using domestic violence against his or her spouse or former spouse or a child or an incapacitated adult or any other member of the family, as the case may be, as specified in the order.
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> (2) An interim protection order shall cease to have effect upon the completion of the investigations.
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> 5(1) The court may, in proceedings involving a complaint of domestic violence, issue any one or more of the following protection orders:
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> (a) a protection order restraining the person against whom the order is made from using domestic violence against the complainant;
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> (b) a protection order restraining the person against whom the order is made from using domestic violence against the child;
>
> (c) a protection order restraining the person against whom the order is made from using domestic violence against the incapacitated adult.

Section 6 provides for the various orders that may be included in the protection order issued under s 5 if the court is satisfied on the balance of probabilities that it is necessary for the protection or personal safety of the complainant.

It is observed that the said ss 4 and 5 only provide for the powers of the court to issue the order to which it relates under the circumstances specified therein without setting out the procedure for its issuance. It is also apparent from the clear and unambiguous language thereof, that the said sections provide for two different and distinct orders which can be obtained separately independent of each other under the circumstances and for the purpose specified in relation thereto. Having said so I shall now come to the crux of the issue in this appeal, that is whether reference in sub-s 5(1) to the expression 'in proceedings involving domestic violence' as a requirement for the issuance of a protection order thereunder relate to criminal proceedings only. In my view, the answer to this question can be found in Part IV of the Act, particularly in ss 12, 13, and 14 thereof which read as follows:

PART IV
PROCEDURE ON PROTECTION ORDERS

12 An interim protection order may be sought pending investigations by the police following an information relating to the commission of an offence involving domestic violence.

13 A protection order may be sought during any criminal proceedings under the Penal Code where the accused is charged with an offence committed under circumstances that falls within the definition of 'domestic violence' —
(a) as a condition of the accused's release on bail or at any other stage of the proceedings; or
(b) upon the compounding of such offence under section 260 of the Criminal Procedure Code [Act 593].

14 A complaint pursuant to this Act may be filed in any district where —
(a) the complainant resides;
(b) the offender resides;
(c) the alleged violence occurred; or
(d) the victim is temporarily located,

and shall be heard by the court as soon as practicable.

Section 16 requires the registry of the court to maintain a record of all complaints filed pursuant to the Act, and all protection orders and all interim protection orders issued by the court under this Act. Section 20 of the Act empowers the minister to prescribe by regulation the form of any report or complaint required pursuant to the Act and the procedure of the filing of any of such document in court.

Since the expression of 'an offence involving domestic violence' as appearing in s 12 and the expression 'an offence committed under circumstances that fall within the definition of domestic violence' in s 13 are not specifically defined or interpreted in the Act, for completeness it shall be necessary to firstly ascertained the meaning of those expressions. As the Act is to be read together with the Penal Code there can be no doubt that the word 'offence' under the Act shall have the meaning assigned thereto under s 40 of the Penal Code, and the expressions to 'an offence involving domestic violence' and 'an offence committed under circumstances that falls within the definition of domestic violence' must mean the offence under the Penal Code which is committed under the condition and circumstances as described in the definition of 'domestic violence' in s 2 of the Act.

In the interpretation of any written law, the task of this court is to give effect to the intention of Parliament, if that can be seen from the language of the statue (see *Davis v Johnson* [1978] 1 All ER 1132), and the first canon of construction, that is the literal rule, is to give the 'ordinary and natural meaning' of the words contained in a statute (see *Cresswell v BOC Ltd* [1980] 3 All ER 443). In the case before me, I am of the view that the language of the Act is clear and unambiguous and the intention of the legislature is apparent.

With regard to the issuance of an interim protection order, I am of the view that s 4 should be read together with s 12, where the said s 4 provides

for the powers of the court to issue the interim protection order, while s 12 provides for the circumstances when such order may be sought. By reading the two sections together, in my opinion, the only construction that can be made is that an interim protection order may only be issued by the court if there is a pending investigation by the police following an investigation of domestic violence.

Likewise, with regard to the issuance of a protection order under s 5, in my opinion, the said s 5 should be read together with s 13, where s 5 provides for the power of the court to issue such order, while s 13 provides for the circumstances under which such order may be sought. There can be no doubt from both the provisions that a protection order may only be issued under s 5 in the following circumstances, that is to say firstly, there must be a criminal proceeding against the person in respect of whom the protection is sought, secondly, the criminal proceedings must relate to a charge for an offence involving domestic violence and thirdly, the protection order is issued as a condition for such person's release on bail or upon the compounding of the offence. Such a view is also consistent with the meaning given to 'court' in s 2, where proceedings involving allegations of domestic violence are referred to as criminal proceedings. For the reasons aforesaid, I cannot agree with the contention of the learned counsel for the appellant that the word 'proceedings' in the said s 5 and to be given wider interpretation so as to include the proceedings for the protection order as taken out by the appellant in this action. To give such a construction would, in my opinion, be contrary to the procedure and mechanism stipulated in the Act for the issuance of such protection order. The Act does not require a person seeking a protection order under s 5 to commence any separate proceedings against the person in respect of whom the protection order is sought. Such protection order may be issued by the court in the course of the criminal proceedings against the accused if it is satisfied on the balance of probabilities that it is necessary for the protection and personal safety of the complainant.

Award of costs

As to the second ground of appeal which relates to costs, it is my finding that the appellant had wrongly commenced this action by way of civil proceedings against the respondent for the issuance of the protection order sought under the Act. For the reasons stated earlier, no application as in the instant case is necessary for the issuance of a protection order under the Act. In my view, the machinery of the Act shall be triggered upon complaint made under s 14 of an offence involving domestic violence or upon information given under s 18 of the commission of such offence. A complaint pursuant to the Act shall be filed in court in accordance with s 14 at the places specified therein and shall be heard by the court as soon as practicable. Since the respondent had incurred costs and expenses in defending this action, it is my finding that the magistrate is justified in awarding costs to the respondent in setting aside the ex parte order.

For the foregoing reasons, I dismissed this appeal with costs to the respondent to be taxed unless otherwise agreed. A

Appeal dismissed.

Reported by Benjamin Yong

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